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NO. 80-1827

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

R. G. RUSS, JR, ET UX,

Petitioners

VS.

STATE OF TEXAS, ET AL.

Respondents

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

STATE RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The basic question presented for review is whether the district court and the court of appeals utilized the proper standards for reviewing the adequacy of the administrative process which included the preparation and approval of an Environmental Impact Statement (EIS).

A second question presented for review is whether the actions taken by the respondent governmental agencies were based on substantial evidence and were in compliance with applicable agency rules and procedures.

A threshhold question presented for review is whether there is substantial evidence in the record to support the factual findings of the district court, which were, in turn, affirmed by the Fifth Circuit.

State Respondents perceive no question of conflict between the opinions below in this case and any opinions of this Court or the other courts of appeals.

LIST OF PARTIES

Petitioners are Mr. and Mrs. R. G. Russ, Jr.

Respondents represented in this brief (and called State Respondents herein) are The State of Texas; the State Department of Highways and Public Transportation; Mr. A. L. Lewis, Mr. G. Wall, Jr., and Mr. M. G. Goode (successor to Mr. B. L. DeBerry), all in their official capacities as officials of the State Department of Highways and Public Transportation.

Additional respondents (not represented in this brief) are the Environmental Protection Agency (an agency of the United States of America); Clinton B. Spotts, in his capacity as an official of the Environmental Protection Agency; and the Secretary, United States Department of Transporation.

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OPINIONS BELOW

The opinions of the United States Court of Appeals and the United States District Court, as well as the District Court's Findings of Fact and Conclusions of Law, are faithfully reproduced in the Appendices to the Petition.

JURISDICTION OF THIS COURT

Petitioners' statements under section entitled "Jurisdiction" in the Petition are accepted.

STATUTES INVOLVED

Petitioners' statement that the applicable statute is 42 U.S.C. § 4332 is accepted by State Respondents with one exception: part (F) would seem to be directed to international cooperation, which has nothing to do with the facts of the instant case.

STATEMENT OF THE CASE

Petitioners filed an action in the United States District Court for the Northern District of Texas, Lubbock Division, seeking to enjoin further planning, property acquisition and construction on an interstate highway project in Hale and Swisher Counties in the Texas Panhandle between Lubbock and Amarillo. The project is essentially the improvement of an old 4-lane U.S. highway into an interstate highway. The old highway, U.S. 87, was built between 1928 and 1935 and was in generally poor or below average condition, with deteriorating roadway, low clearances, unpaved shoulders and many crossings at grade. Notwithstanding improvements made in the 1950's and 1960's, its condition had been the subject of numerous complaints by the public.

The interstate highway, IH 27, was well underway with millions of dollars already spent before Petitioners brought the instant suit in 1978 claiming that no final Enviromental Impact Statement (EIS) had been filed before commencing the project, or alternatively, that the final EIS which was filed was inadequate. The interstate highway will be a safer roadway with controlled

access, frontage roads, paved shoulders, adequate clearances, improved drainage features, and overpasses and underpasses instead of crossings at grade. The entire project length is about 52 miles, of which only 19 miles will be on new location. In other words, most of the project is on right of way that was acquired and has been traversed by an existing highway for several decades.

Petitioners were present at public hearings conducted in 1973 and 1974 when the enviromental impact of the project was discussed and the draft EIS was made available for public inspection. Although public comment and criticism were repeatedly invited, Petitioners did not comment or criticize the draft EIS of which they now complain. Public comment at the hearings was overwhelmingly in favor of the project; and Respondents' receptivity to public comment is shown by several design changes made in direct response to public participation at the design hearings.

Petitioners filed the instant suit approximately five (5) years after adoption of the final EIS and, curiously, only two months after their rejection of the State's final offer of compensation for the condemnation of some 28.8 acres of Petitioners' farmland for the project. The final offer is a step in the State's acquisition of property by eminent domain; following rejection of the offer, the State filed eminent domain proceedings in the State court in Hale County seeking judicial determination of the fair market value of the property to be taken. Condemnation proceedings in regard to the acquisition of 28.8 acres of Petitioners' property by eminent domain are still pending in State Court.

Petitioners' Statement of the Case contains serious factual inaccuracies. One inaccuracy is the statement that a single feature of the project is admittedly a major federal action in itself. This particular feature, the

crossing of the Canadian River Aqueduct, was adequately discussed in the EIS and was found by the district court to have been adequately considered and discussed. This aspect of the project is now complete and there have been no ill environmental consequences; discussion on this point is now moot.

Another factual inaccuracy is a statement that there will admittedly be an increase in certain auto emissions as a result of the project. Respondents denied and did not admit this allegation. Petitioners did not show (and the district court did not find) that there would be any increase in exhaust emissions as a result of the project or that completion of the project would have this kind of adverse effect upon the environment.

An outrageous factual inaccuracy is the assertion that the EIS contains no discussion of the "do nothing" alternative and that the absence of such discussion is undisputed. This proposition was vigorously disputed. The EIS does contain discussion of the "do nothing" alternative and the district court so found (Finding of Fact 42, Petition Appendix B-7). Moreover, the Court of Appeals held that the district court's findings have ample support in the record (Petition Appendix A-5).

What is undisputed in this case is that the Federal Highway Administration and the Texas State Department of Highways and Public Transportation complied fully with the applicable procedures that had been promulgated by the Department of Transportation pursuant to 42 U.S.C. § 4321, et seq., in preparing, circulating, adopting, approving and filing the EIS, as well as in holding the public hearings which comprise an integral part of the decision-making process. The applicable procedures were those contained in Federal Highway Administration Policy and Procedure Memoranda (PPM) 90-1 and 20-8, and the district court held there was no proof of noncompliance with the

regulations by any respondent (Conclusions of law 2 & 5, Petition Appendix B-7). In fact, there was complete compliance with the applicable Policy and Procedure Memoranda as the record well substantiates.

Another factual inaccuracy in the Petitioners' Statement is the characterization of some property crossed by the project as "wetlands." This is a brand new contention which is not mentioned in the record below. But if the reference is intended to apply to the property that was discussed in greatest detail in the trial court, then it is far afield because the evidence was that Callahan Draw is *usually dry.* (Finding of Fact No. 27, Petition Appendix B-4).

The factual inaccuracies of the Petition are so numerous that this response is not intended to be an exhaustive catalog of them. Respondents have attempted to point out the most important inaccuracies.

ARGUMENT

The most obvious reason for denying the writ of certiorari is the presence of serious inaccuracies in the Petition. Such inaccuracies are violative of this Court's Rule 21.5. The actual nature of the questions presented for review is hidden by misrepresentation of the facts in the case and the holdings below. For example, Petitioner's formulation of the questions presented for review would lead a reader to think that the district court and the court of appeals held an Enviromental Impact Statement (EIS) to be adequate when the EIS did not even mention such things as the "do nothing" alternative, the commitment of farmland to the project, and emissions. The actual holding of the courts below was that these and other relevant environmental concerns *were* discussed in the EIS and that the administrative process which includes EIS preparation complied fully with all applicable agency regulations.

It appears that by misstating the factual findings below, petitioners seek by writ of certiorari to relitigate facts which were found adversely to their position. This would be an abuse of the writ of certiorari. In regard to the findings of the district court, the Fifth Circuit held unequivocally, "Having reviewed the record, we find that the district court's findings have ample support." (Petition Appendix A-5). A more straightforward method of obtaining review of adverse fact findings would be to suggest as a question presented for review, "Are factual findings by the district court in regard to the EIS, which were affirmed by the court of appeals, based upon substantial evidence in the record?" State respondents submit that the record amply supports all the district court's findings, and the court of appeals so held.

State Respondents can perceive no conflict between the opinions below and the opinions of this Court or of any other circuit. Petitioners argue that the holdings below conflict with *Strycker's Bay Neighborhood Council, Inc. v. Karlen*,____U.S.____, 100 S.Ct. 497, 62 L.Ed.2d 433 (1980), and with *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 55 L.Ed.2d 460, 98 S.Ct. 1197 (1978). Both of the cited cases support denial of certiorari or summary affirmance of the holdings below.

In *Strycker's Bay, supra*, this Court held that the National Enviromental Policy Act (NEPA) imposes duties upon the agencies that are "essentially procedural" at 100 S.Ct. 500, citing *Vermont Yankee, supra.*
Petitioners have not complained and have no basis to complain that there was any deviation from the required procedures in the instant case. The district court made a number of findings (affirmed by the Fifth Circuit) in regard to agency compliance with applicable procedural requirements (Findings of Fact Nos. 6,7,8,9,13,14,15,16 and Conclusions of Law Nos. 1,2,3,4,5; Petition Appendix B-2,3,7).

The only purpose which can be served by granting the writ of certiorari is to make this Court the final arbiter of whether the agency decisions were good or bad, or what the decisions might have been if the members of this Court had participated in them. This is exactly the sort of review that was rejected by this Court as unsatisfactory in *Vermont Yankee, supra,* when admonishing the Court of Appeals for the District of Columbia Circuit that it must not impose upon an agency its own notion of which procedures are best or most likely to further some vague, undefined public good. At 435 U.S. 549, 98 S.Ct. 1214.

In essence, what Petitioner is seeking is that this Court make another review of the considerable trial record and voluminous exhibits in order to find what both lower courts have agreed was not shown by Petitioners below -- evidence that there is any significant environmental impact which was not considered by the responsible agencies in their decision-making process. Each of the areas which Petitioners alleged were not discussed in the EIS were found by the district court to have been discussed therein (Findings of Fact Nos. 29,30,33,37,39,40,42; Petition Appendix B-5,6,7); the review sought would require an examination of the record for the evidence supporting each finding, an examination already undertaken by the Fifth Circuit in its review.

Petitioner argues that the opinion below conflicts with the seventh Circuit's opinion in *Swain v. Brinegar,* 517 F.2d 766 (7th Cir. 1975), modified 542 F.2d 364 (7th Cir. 1976, en banc). This is not so. In *Swain*, unlike in the instant case, the Seventh Circuit found an EIS wanting for failure to comply with Federal Highway Administration Policy and Procedure Memorandum (PPM) 90-1 at 542 F.2d 368-370. In the instant case, the district court found expressly that Petitioners had failed to prove any noncompliance with PPM 90-1.(Conclusions of Law No. 2, Petition Appendix B-7).

The language in *Swain v. Brinegar, supra,* which best supports Petitioners' argument is found in the panel opinion reported at 517 F.2d 766. The panel opinion is noted for its rejection of an EIS because its preparation had been delegated by federal to state officials (517 F.2d at 776-777); Congress thereafter amended NEPA to prevent such a result (89 Stat. 424, Public Law 94-83), and the Seventh Circuit, sitting en banc, issued a new opinion recognizing that the basis of the panel opinion had been eviscerated by Congress (542 F.2d at 367). In other words, the holding in *Swain v. Brinegar, supra,* with which the opinion below allegedly conflicts, is not the law of any circuit including the Seventh Circuit whose panel opinion was superseded by an en banc opinion entirely harmonious with the holdings in the instant case.

Petitioners have argued that the decision below is in conflict with *Robinson v. Knebel,* 550 F.2d 422 (8th Cir. 1977). This is not so. The district court in *Robinson, supra,* held that there was an adequate discussion of alternatives in the EIS and dismissed the complaint; the Eighth Circuit agreed and affirmed the dismissal. Similarly, in the instant case the district court found that there was an adequate discussion of alternatives to the project and dismissed the complaint; the Fifth Circuit agreed and affirmed on the basis that the district court's findings have ample support in the record. (Petition Appendix A-5, B-7, B-8).

A further reason for denial of the writ is the unfairness to the general public that would result from continuation of the present litigation and the inequity that would arise from any grant of equitable relief to the petitioners. The facts which show that no relief ought to be granted are: a) The petitioners attended hearings in 1973 and 1974 where environmental impact of this project was discussed and the draft EIS was made available

for public inspection or comment prior to its final adoption or approval. b) The EIS in its final form addressed comments and questions that were raised about the project or the contents of the draft EIS. c) Although comment or criticism of the EIS or the project was invited, Petitioners did not comment. d) Although written comments were invited at the conclusion of the hearings, Petitioners did not comment in response to the invitation. e) The nature of Petitioners' present criticisms of the EIS is such that if any of the alleged deficiencies existed, and had been pointed out when the EIS was in its draft form, they could easily have been remedied before final approval of the EIS. f) At the public hearings the comments of those who did choose to comment about the project were favorable, and the wishes of other members of the community who did speak out at the proper time would be thwarted if relief were given to those who did not bother to comment. g) Final approval of the EIS preceded the filing of Petitioners' lawsuit by nearly five years; in the interim, millions of dollars have been spent on the project and millions more are committed. h) Petitioners have a full and fair opportunity to obtain economic satisfaction for the property being acquired from them in the eminent domain proceedings presently pending in state court. Petitioners' failure to utilize the public forums intended to offer all of the people affected by this project an opportunity to be heard and to influence the governmental decisions attacked in this lawsuit *before* they are put into effect was the subject of numerous findings of fact by the trial court (affirmed by the court of appeals). (Findings of Fact Nos. 8,9,10,12,13,18,19,21; Petition Appendix B-2,3,4).

CONCLUSION

The writ of certiorari should be denied by the Court in this case because:

A) There is no conflict between the opinion of the Fifth Circuit in the instant case and any opinions of this Court or of any other circuit.

B) Petitioners' quarrel with the opinions below is with the facts found adversely to their case by the trial court and affirmed by the court of appeals on the basis of substantial evidence in the record; the writ of certiorari should not issue merely to relitigate adverse fact findings below.

C) The Petition contains numerous factual inaccuracies, in that it represents as undisputed or admitted a number of propositions that were vigorously disputed, never admitted, and were the subject of fact findings by the courts below that are at odds with the facts alleged by Petitioners to be the basis of their case.

D) It would be grossly unfair to further protract this litigation in view of the conduct on the part of Petitioners which shows laches and an unwillingness to participate in the administrative process underlying agency decisions at a stage when public participation is meaningful and other members of the public could have an equal opportunity to respond also.

E) This Court should not dignify by granting the writ a transparent attempt to use NEPA for the sole purpose of making a collateral attack upon a condemnation proceeding pending in state court, which proceeding has been held to be a constitutionally valid, lawful undertaking.

F) The challenged agency decisions were based upon substantial compliance with applicable regulations promulgated pursuant to NEPA and the courts below so held. Moreover there is not the least indication that there has been any arbitrary or capricious agency action.

In concluding, this writer wishes to note that, much though he would relish the opportunity to argue his first case before the United States Supreme Court, he cannot in good conscience recommend this case as one worthy of the Court's consideration.

WHEREFORE, PREMISES CONSIDERED, State Respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted,

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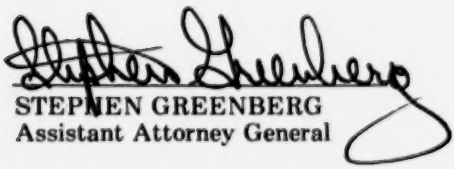

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CERTIFICATE

I do hereby certify that true copies of the foregoing brief have been served upon counsel for Petitioners and upon the Solicitor General of the United States in accordance with the rules of this Court and the statutes of the United States on the 29th day of May, 1981, by depositing same in sealed envelopes properly addressed with postage prepaid in the U.S. Mail.

Stephen Greenberg